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Issue Date: 11 January 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER DENYING DEFENDANT'S MOTIONS TO RECONSIDER, TO DISMISS, OR TO HOLD IN ABEYANCE

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60, and is not currently set for hearing.[1]

This matter has been stayed several times at the parties' request as they attempted to mediate the dispute. However, according to the Office of Federal Contract Compliance Programs ("Plaintiff" or "OFCCP"), the mediation attempts "have not fully resolved" this matter and it will require adjudication. Accordingly, on October 12, 2018, Plaintiff filed a Motion to Reassign under *Lucia v. S.E.C.*, 585 U.S.___, 138 S.Ct. 2044 (2018) ("Pl. Mot."). On October 15, 2018, Administrative Law Judge Christopher Larsen granted Plaintiff's motion and, at the direction of District Chief Administrative Law Judge Jennifer Gee, transferred the case to me for all further proceedings.

On October 23, 2018, Oracle America, Inc. ("Defendant" or "Oracle") filed a Partial Opposition to OFCCP's Motion to Reassign, Motion to Reconsider Order Granting OFCCP's Motion to Reassign, and Motion to Dismiss or to Hold in Abeyance ("Def. Opp. & Mot."). On November 21, 2018, Plaintiff filed its Opposition to Defendant's motions ("Pl. Opp.").

Background

On June 21, 2018, the Supreme Court decided *Lucia v. S.E.C.*, 585 U.S.___, 138 S. Ct. 2044, (2018). *Lucia* involved Administrative Law Judges ("ALJs") at the Securities and Exchange

[1] On November 13, 2018, I granted Plaintiff's request to stay all further activity in this matter until resolution of the pending motions.

Commission ("SEC") and the interpretation of the Appointments Clause of the U.S. Constitution, U.S. Const. art. II, § 2, cl. 2, which prescribes the method for appointing "Officers" of the United States. The Appointments Clause provides that "inferior Officers" may only be appointed by the "President," "Courts of Law," or "Heads of Departments."[2] U.S. Const. art. II,§ 2, cl. 2; *Lucia*, 138 S. Ct. at 2051. Non-officer employees of the federal government, "part of the broad swath of 'lesser functionaries' in the Government's workforce," are not subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2051, citing *Buckley v. Valeo*, 424 U.S. 1, 126, n.162 (1976) (*per curiam*). The parties in *Lucia* agreed that the SEC ALJ in question had not been appointed in conformance with the Appointments Clause. *Lucia*, 138 S. Ct. at 2051. While the Commission itself qualified as a "Head[ ] of Department[ ]," the Commission left the task of appointing SEC ALJs up to SEC staff members. *Id.* at 2050. The question before the Court was whether the SEC ALJs qualified as "Officers" subject to the Appointments Clause or whether they were "simply employees of the Federal Government." *Id.* at 2051.

Relying on *Freytag v. Commissioner*, 501 U.S. 868 (1991), the Court ruled that SEC ALJs are inferior officers subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2053, 2055. In *Freytag*, the Court held that Special Trial Judges ("STJs") at the United States Tax Court were inferior officers after discussing a variety of powers that the STJs possessed. *Freytag*, 501 U.S. at 881-82. Comparing the powers and characteristics of the STJs in *Freytag* to those of the SEC ALJs, the *Lucia* Court concluded that "*Freytag* says everything necessary to decide this case." *Lucia*, 138 S. Ct. at 2053. Since the SEC ALJs at issue in *Lucia* were substantially similar to the STJs, SEC ALJs were also inferior officers. *Id.* at 2052-55. Because the ALJ who heard Mr. Lucia's case lacked a valid appointment at the time he heard and decided the case, the Court ordered a new hearing before a different and properly appointed ALJ. *Id.* at 2055.

On April 21, 2017, prior to the Supreme Court's ruling in *Lucia*, Defendant filed a Motion for Summary Judgment in which it objected to these proceedings based on an Appointments Clause challenge. Judge Larsen overruled this objection in his May 10, 2017 Order after Pre-Hearing Conference.

On December 21, 2017, the Secretary of Labor R. Alexander Acosta individually ratified the appointment of each of the Department of Labor's ("DOL") then-serving ALJs, including mine.[3] The individualized letters for each incumbent ALJ at the Office of Administrative Law Judges ("OALJ") stated:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S.

[2] "Principal" officers, not at issue in *Lucia*, must be appointed by the President, with the advice and consent of the Senate. U.S. Const. art. II,§ 2, cl. 2; *Edmond v. United States*, 520 U.S. 651, 659-60 (1997). This method "is also the default manner of appointment for inferior officers," *Edmond*, 520 U.S. at 660, but the Appointments Clause allows Congress to "authorize the President alone, a court, or a department head to appoint an inferior officer." *Lucia*, 138 S. Ct. at 6051, n.3.

[3] *See* https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

In its Motion to Reassign filed on October 12, 2018, Plaintiff conceded that DOL ALJs are inferior officers subject to the Appointments Clause, that DOL ALJs were not properly appointed prior to December 21, 2017, and that Defendant timely presented an Appointments Clause challenge. Pl. Mot. at 2-3; *see also* Brief for Respondent at 14 n.6, *Big Horn Coal Co. v. Sadler*, No. 17-9558 (10th Cir. July 20, 2018) (cited in Pl. Mot. at 2, n.4). Plaintiff contended that because Secretary Acosta ratified the appointments of all existing ALJs on December 21, 2017, all current ALJs are now properly appointed. Pl. Mot. at 3. Therefore, according to *Lucia* and "[t]o preclude a Constitutional challenge," Plaintiff sought the reassignment of this case to "a different and constitutionally appointed ALJ." *Id.* at 2-3.

On October 15, 2018, Judge Larsen granted Plaintiff's Motion to Reassign and noted that while the Secretary of Labor appointed him on December 21, 2017, he took "significant action" in the case before his appointment. He also noted that "[u]nder *Lucia*, [he] should have granted Defendant's motion [to disqualify him from the case on Appointments Clause grounds], and must now grant Plaintiff's motion to reassign this case."

Defendant's Partial Opposition and Motions

While Defendant agrees with Plaintiff that Judge Larsen can no longer preside over the matter due to *Lucia*, it argues that reassigning this matter to a different ALJ does not resolve its Appointments Clause challenge because "there is not currently an ALJ in the Department [of Labor] that can constitutionally preside over this matter." Def. Opp. & Mot. at 1-2. Defendant asserts that mere reassignment would result in the waste of significant time and resources as the parties relitigate the matter only to have the process "start again once the constitutional questions are resolved." *Id.* at 2. Therefore, Defendant seeks dismissal without prejudice so Plaintiff can re-file the matter once the "constitutional difficulties" are resolved, or that the matter be held in abeyance until such issues are resolved. *Id.*

Initially, I note that Defendant directed its partial opposition and motions to Judge Gee because: 1) Plaintiff directed its motion to this Office, 2) Judge Larsen stated in his October 15, 2018 Order Granting Motion to Reassign that Judge Gee directed him to transfer the case, and 3) Defendant does not believe Judge Larsen has the authority to rule on Plaintiff's motion. Def. Opp. & Mot. at 1. Defendant's partial opposition and motions are assigned to me to adjudicate as Judge Larsen transferred the case to me for all further proceedings. While a motion for reconsideration would normally be directed to the judge who issued the original order, Defendant's arguments in support of its Motion to Reconsider Judge Larsen's Order Granting Motion to Reassign are indistinguishable from its arguments in support of its Motion to Dismiss or to Hold in Abeyance. I have been assigned this case for all purposes and find that it is most efficient for one judge to consider these motions together. Additionally, Judge Larsen determined that he could no longer preside over the matter under *Lucia*.[4]

[4] To the extent Defendant sought Judge Gee's adjudication of the issues as the District Chief, this request is moot. Judge Gee retired from the OALJ effective January 3, 2019, and I currently serve as Acting District Chief Judge.

1. Judge Larsen's Ability to Preside Over this Matter

Defendant contends that under *Lucia*, Judge Larsen cannot preside over this matter because he is an inferior officer who was not properly appointed, Defendant timely objected to his appointment, and the *Lucia* remedy dictates that the matter be heard by a different, properly appointed ALJ. Def. Opp. & Mot. at 2-5. Plaintiff responds that the case has already been transferred from Judge Larsen rendering Defendant's arguments on this point moot. Pl. Opp. at 2.

Defendant's argument that Judge Larsen cannot preside over this matter was already addressed by Judge Larsen in his Order Granting Motion to Reassign issued on October 15, 2018. Judge Larsen ruled that he cannot hear the matter since he took significant action in the case before his December 21, 2017 appointment and, at the direction of Judge Gee, reassigned the matter to me. Consequently, Defendant's argument that Judge Larsen cannot preside over this matter is moot.

Further, while *Lucia* did not directly address whether DOL ALJs are inferior officers, whether DOL ALJs are inferior officers is not at issue here. After *Lucia* was decided, DOL determined that DOL ALJs are inferior officers subject to the Appointments Clause and conceded the point in appellate briefs in cases under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act. *See* Director's Resp. to Motion for Summary Vacatur at 5, n.2, *Dominguez v. Bethlehem Steel Corp.*, No. 18-70184 (9th Cir.); Brief for Respondent at 14 n.6, *Big Horn Coal Co. v. Sadler*, No. 17-9558 (10th Cir.). In its Motion to Reassign, Plaintiff also conceded DOL ALJs are inferior officers through its citation to *Big Horn Coal Co. v. Sadler*, *see* Pl. Mot. at 2, n.4, and its admission that prior to December 21, 2017, DOL ALJs were not properly appointed. Pl. Mot. at 3. Therefore, the parties are in agreement that Judge Larsen is an inferior officer and that "*Lucia* invites invalidation of the motions and pleadings ALJ Larsen has adjudicated in this case." Pl. Mot. at 3; *see also* Def. Opp. & Mot. at 4. No further order regarding Judge Larsen's ability to hear this case is warranted.

However, Defendant's Motion to Reconsider seeks a ruling that not only is Judge Larsen precluded from hearing this matter, but that there is no DOL ALJ that can constitutionally preside over this matter, and that therefore the matter should be dismissed or held in abeyance. Defendant's argument for reconsideration of Judge Larsen's ruling in this respect is discussed below.

2. Motion to Reconsider & Motion to Dismiss or to Hold in Abeyance

Defendant's argument that DOL ALJs are not properly appointed under the Appointments Clause is based on two contentions: 1) that Secretary Acosta's December 21, 2017 ratification cannot and did not cure the Appointments Clause issue, and 2) that the competitive service unlawfully constrains the appointments. Def. Opp. & Mot. at 5-9. Additionally, Defendant argues that the manner of supervision of DOL ALJs, including limitations on removal, "renders them constitutionally unfit." *Id.* at 9-11. The appropriate remedy, according to Defendant, is to dismiss the matter without prejudice or to stay it until there is a properly appointed DOL ALJ who can preside over the matter. *Id.* at 12-14.

Plaintiff responds that DOL ALJs are properly appointed and may adjudicate the matter because Secretary Acosta's ratification of the appointments cured any constitutional defect, the manner of supervision of DOL ALJs does not violate the Constitution, and removal limitations do not invalidate the ALJs' appointments. *See* Pl. Opp. at 2-8.

Administrative agencies are not competent to invalidate a statute on constitutional grounds. *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (citing *Moore v. East Cleveland*, 431 U.S. 494, 497 n.5 (1977); *Mathews v. Diaz*, 426 U.S. 67, 76 (1976)). The power of OALJ to hear and decide this case derives from Executive Order 11246 (30 Fed. Reg. 12319), as amended, and the associated regulations at 41 C.F.R. Chapter 60. Under 41 C.F.R. § 60-30.15, an ALJ has "all powers necessary" to conduct a fair hearing, including the power to rule on motions and matters pending before him or her. In *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), the Sixth Circuit concluded that an Appointments Clause challenge was an "as-applied" constitutional challenge directed at the way the agency implemented its statutory authority, not a "facial" challenge to the constitutionality of the statute. Agencies are competent to entertain "as applied" challenges because they are positioned to provide relief. 898 F.3d at 674-77. Here it is proper to consider the challenge because the agency can provide relief, for instance by not hearing the case until properly appointed ALJs are available.

a. Ratification

Defendant's Arguments

Defendant argues that Secretary Acosta's ratification on December 21, 2017, did not cure the improper appointment of DOL ALJs. In support of this contention, Defendant makes a number of arguments. Defendant first claims that the December 21, 2017 letters "bear none of the necessary hallmarks for a proper appointment," e.g., an oath or affirmation and the signing and delivery of a commission. Def. Opp. & Mot. at 5. According to Defendant, such requirements are necessary to ensure accountability and make it clear that someone is an officer of the United States. *Id.* at 5-6, citing *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1234–35 (2015) (Alito, J., concurring) and *Edmond v. United States,* 520 U.S. 651,660 (1997). Next, Defendant avers that Secretary Acosta "merely rubber stamp[ed]" the determination that the incumbent DOL ALJs should be appointed, indicating that he did not give due consideration to the appointment of the ALJs and that he considers the Appointments Clause a "mere 'matter of etiquette or protocol.'" *Id.* at 6, quoting *Edmond*, 520 U.S. at 659. Defendant also argues that the ratification orders demonstrate that the Secretary did not consider what he was doing to be an *appointment* since the terms "ratification" and "appointment" have different meanings and the Secretary could have used the word "appoint" instead of "ratify." *Id.* at 6-7.

Finally, Defendant contends that there is no "prior appointment" for Secretary Acosta to ratify because DOL ALJs were hired by a person without constitutional authority to make an appointment under the Appointments Clause. Def. Opp. & Mot. at 7-8. Relying on principles of agency law, Defendant argues that a principal cannot ratify an act by an agent that would have been invalid even with his authorization. *Id.* at 7. Defendant avers that because the Secretary cannot delegate his authority to appoint ALJs under the Appointments Clause, and the person who hired the DOL ALJs was not in one of the constitutionally mandated positions, Secretary Acosta's ratification is ineffective. *Id.* at 8.

Plaintiff's Response

Plaintiff responds that DOL ALJs are properly appointed and may adjudicate matters because Secretary Acosta's ratification cured any constitutional defect. Pl. Opp. at 2-5. Plaintiff notes that the appointment of an officer need only be "evidenced by an open, unequivocal act,"

citing *Marbury v. Madison*, 5 U.S. 137, 157 (1803), and that the Secretary made such an open and unequivocal appointment of DOL ALJs through his December 21, 2017 letters. *Id.* at 3. Plaintiff argues that the Secretary's action "comes with the presumption of regularity," and that Defendant's arguments that there may be some question as to whether DOL ALJs were actually appointed are unpersuasive. *Id.* Plaintiff also notes that there is no indication DOL ALJs did not take the standard oath of office required for federal employees. *Id.*

Further, Plaintiff avers, ratification of the appointments is sufficient to cure any constitutional defect because "ratification can remedy a defect arising from the decision of 'an improperly appointed official . . . when . . . a properly appointed official has the power to conduct an independent evaluation of the merits and does so.'" *Id.* at 3-4, quoting *Wilkes-Barre Hosp. Co., LLC v. Nat'l Labor Relations Bd.*, 857 F.3d 364, 371 (D.C. Cir. 2017).[5] Plaintiff contends that the Secretary has the authority to ratify the previously unauthorized acts of his agents within the DOL, and that "there is no doubt that the Secretary could have approved the ALJ's original hiring by staff and that such approval would satisfy the Appointments Clause." *Id.* at 4-5.

Discussion

The Court in *Lucia* did not consider whether ratification of an appointment, and what sort of ratification, renders an appointment valid. *Lucia*, 138 S. Ct. at 2055 n.6 ("We see no reason to address that issue."). After considering the parties' arguments, I find that the Secretary's December 21, 2017 letters cured any Appointments Clause defect in DOL ALJs' appointments and deny Defendant's motions on this ground.

The Secretary's December 21, 2017 letters provided, in part, that "[i]n my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge." These letters are published and available to the public. With these letters, the Secretary extended his authority to the appointments and took responsibility for them.[6] This qualifies as an "open" and "unequivocal" act in making the DOL ALJ appointments his own, and is sufficient to "ensure public accountability" for the appointments. *See Marbury*, 5 U.S. at 157; *Edmond*, 520 U.S. at 660. The Secretary's choice of words does not dissuade me from reaching this conclusion. The Appointments Clause does not specify any particular words that must be used in the appointment of an inferior officer. *See* U.S. Const. art. II, §2, cl. 2. It only requires that the appointment be made, in this instance, by the head of department. While the Secretary used the word "ratify," he clarified what the letters were accomplishing: he was "address[ing] any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution."[7] This establishes that he was acting in his constitutional capacity to make the

[5] Defendant addresses *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), contending that the ratification discussed there can be distinguished from the Secretary's actions here. *See* Def. Opp. & Mot. at 8-9. Plaintiff characterizes Defendant's interpretation of *Wilkes-Barre Hospital* as "simply incorrect." Pl. Opp. at 4, n.2. I did not find the discussion regarding *Wilkes-Barre Hospital*, or Plaintiff's reliance on the case, necessary to my determination of the ratification issue.

[6] No argument has been made that Secretary Acosta does not have authority to appoint ALJs. *Cf.* 5 U.S.C § 3105.

[7] Defendant asserts that the SEC declined to rely on its ratification order, issuing a second order "[making] clear that it is *appointing* its ALJs in its own right," and contends that "Secretary Acosta has done nothing similar, and the difference

appointments his own and cure any Appointments Clause defect.[8]

Defendant's arguments regarding Secretary Acosta's ability to ratify a "prior appointment" are unavailing. Defendant focuses its argument on the contention that Secretary Acosta cannot delegate his authority to someone in the Department of Labor who does not have the "constitutionally significant power to appoint in the first place." Def. Opp. & Mot. at 7. This argument may be more persuasive if the December 21, 2017 letters attempted to make the ALJs retroactively properly appointed. But the Secretary's letters conferred his authority on the appointments from December 21, 2017 forward. He did not attempt to make DOL ALJs retroactively appointed from their hiring date; instead, he stated that "This action is effective immediately." This is also reflected in the Solicitor's position here and elsewhere—that prior to December 21, 2017, DOL ALJs were not properly appointed, but once Secretary Acosta issued the letters on December 21, 2017, DOL ALJs *were* properly appointed. *See* Pl. Mot. at 3. It is unnecessary, then, to engage with the principles of agency law in the manner invited by Defendant—the type of "ratification" at issue here is not retroactive as it is typically understood in agency law. *See, e.g.*, *Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification relates back and is the equivalent of authority at the commencement of the act.").[9] Instead, the Secretary, as the "head of department," conferred his authority on the appointment of the ALJs as of December 21, 2017, thus satisfying the requirements of the Appointments Clause from that date forward.

Defendant also argues that "[g]ranting OFCCP's request for reassignment renders hollow vindication of the Appointment Clause problem" and would "render Oracle's diligence in raising these constitutional challenges all for naught." Def. Opp. & Mot. at 13. To the contrary, Defendant's diligence in raising the issue assured that it did not forfeit the challenge, and now that there are properly appointed DOL ALJs, Defendant is entitled to the remedy prescribed by the Court in *Lucia*—the opportunity to have the matter adjudicated by a different, properly appointed ALJ. Granting the request for reassignment is in keeping with *Lucia*'s stated goal of creating

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matters." Def. Opp. & Mot. at 6. The August 22, 2018 SEC Order states "In an abundance of caution and for avoidance of doubt, we today reiterate our approval of their appointments as our own under the Constitution." *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, https://tinyurl.com/y6wz2zsj (Aug. 22, 2018). I find Defendant's argument unpersuasive. The fact that the Commission felt the need to "reiterate" its approval of the ALJ appointments says nothing about whether the December 21, 2017 letters effected a proper appointment of DOL ALJs. As discussed above, I find the Secretary's letters cured any constitutional defect as they were an "open, unequivocal act" completing the appointment of the DOL ALJs.

[8] I see no need to examine the Secretary's process in issuing these letters, as the letters manifest his intent to complete the appointment of DOL ALJs. Neither do I find Defendant's arguments about the "necessary hallmarks for a proper appointment" persuasive. *See* Def. Opp. & Mot. at 5-6. The Secretary's letters sufficiently "ensure accountability" for the appointments.

[9] Defendant cited *Newman v. Schiff* for the proposition that "[r]atification cannot . . . give legal significance to an act which was a nullity from the start." *See* Def. Opp. & Mot. at 7. Defendant frames the "nullity" as the Secretary's inability to authorize someone without constitutional authority to make an appointment of an inferior officer. This argument is addressed above. However, I note that the prior appointments of the DOL ALJs were not nullities in the manner meant in *Newman*. In *Newman*, the court cited an example of an agent entering into a contract lacking in consideration. In such a case, "subsequent ratification by the principal cannot, by itself, create a valid contract." *Newman*, 778 F.2d at 467. There is no indication that there was a similar type of defect here. The prior appointments made individuals federal employees with the title and function of ALJs. While the appointments were ineffective in appointing inferior officers with the ability to exercise the authority of an ALJ because they lacked the authority of the head of department, they were not "nullities" in the sense used by the court in *Newman*.

incentives to raise Appointments Clause challenges by "providing a successful litigant with a hearing before a new judge." *Lucia*, 138 S. Ct. at 2055, n.5.

In sum, because Secretary Acosta had the authority to complete the appointment of DOL ALJs and his December 21, 2017 letters did so, any Appointments Clause defect has been cured. Defendant is entitled to have this matter adjudicated before a properly appointed ALJ who is not Judge Larsen. The matter has been reassigned to me, which is the appropriate remedy under *Lucia*. Defendant's Motion to Reconsider and Motion to Dismiss or to Hold in Abeyance based on the ratification argument are denied.

b. Competitive Service

Defendant argues that at the time the Secretary issued the December 21, 2017 letters, he was "bound" by federal regulations requiring competitive examination and competitive service selection procedures, and that such requirements are "incompatible with the Constitution." Def. Opp. & Mot. at 9. On July 10, 2018, the President issued Executive Order Number 13843, which stated in part that *Lucia* may "raise questions about . . . whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs." *Excepting Administrative Law Judges from Competitive Service* (Exec. Order No. 13843), 83 Fed. Reg. 32,755, 32,755 (July 10, 2018). Accordingly, the President exempted the appointment of ALJs from these requirements and the Secretary subsequently adopted a process for ALJ appointments pursuant to the Executive Order. *Secretary's Order* 07-2018, 83 Fed. Reg. 44307 (Aug. 30, 2018). Defendant contends that the fact that current DOL ALJs were hired and the Secretary's December 21, 2017 act occurred prior to the implementation of the July 10, 2018 Executive Order raise "serious questions about whether the current slate of ALJs have been constitutionally appointed." Def. Opp. & Mot. at 9. Plaintiff did not address this argument.

The Appointments Clause requires only that the appointment be made by the head of department, not that the head of department conform to a particular process to make such an appointment. While *Lucia* indicated that the prior process for appointing ALJs could not continue in the same manner, it is because this process did not vest the decision with the proper constitutional authority. The Court did not prohibit heads of departments from relying on any particular process in making appointments, as long as the head of department is the one conferring his or her authority and responsibility on the appointment. So long as Secretary Acosta made the appointment, the Appointments Clause is satisfied. Defendant's motions on this ground are denied.

c. Manner of Supervision and Removal Limitations

Defendant argues that the manner of supervision of DOL ALJs, including limitations on removal, "renders them constitutionally unfit." Def. Opp. & Mot. at 9-11. Defendant's arguments on these points do not mandate the dismissal or stay of this matter.

Defendant contends that "for an entity to be an appropriate inferior officer, they must be supervised by a principal officer." Def. Opp. & Mot. at 10, relying on *Edmond*, 520 U.S. at 663, 665. Defendant claims that DOL ALJs are supervised by the Administrative Review Board, which is composed of inferior officers, rendering the structure of supervision of DOL ALJs "fundamentally flawed." *Id.* Plaintiff responds that the work of inferior officers only needs to be directed "at some

level" by a principal officer, but not by a principal officer directly, and it is sufficient that the Secretary exercises supervision of ALJs through the Administrative Review Board. Pl. Opp. at 5-6.

Relatedly, Defendant claims that the limitations on ALJs' removal are unconstitutional and therefore ALJs are unable to lawfully perform their duties. Def. Opp. & Mot. at 10-11. Defendant contends that the removal provisions for ALJs violate the separation of powers principles as identified in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). In *Free Enterprise Fund*, the Supreme Court upheld only "limited restrictions on the President's removal power" in order to preserve the President's ability to oversee lower-level officers. 561 U.S. at 495-96. The Court found that the existence of multi-level protections "subverts" the President's authority and political accountability, and therefore held that Congress cannot provide "two levels of protection from removal for those who . . . exercise significant executive power." *Id.* at 498, 514. Defendant contends that "[s]uch an impermissible two-level scheme of tenure protection exists here," since ALJs may be removed "only for good cause established and determined by the Merit System Protection Board," 5 U.S.C. § 752l(a), whose members are themselves removable "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). Def. Opp. & Mot. at 11. Defendant argues that therefore the principles of *Free Enterprise* should apply, resulting in DOL ALJs being "unable to lawfully perform their duties as inferior officers so long as the offending provision remained in place." *Id.* at 11-12. Plaintiff responds that the employment protections afforded DOL ALJs are constitutional "under a proper construction of 5 U.S.C. § 7521," and that *Free Enterprise Fund* is not applicable. Pl. Opp. at 6-8.

I address these arguments together because they can be disposed of in a similar manner. Neither of these asserted deficiencies implicate the appointment of DOL ALJs, only the manner in which they are supervised or removed from their positions. Defendant argues that the purported constitutional problems dictate that ALJs cannot lawfully perform their duties and that dismissal without prejudice (or holding the matter in abeyance) is therefore warranted. But if there are any flaws in the supervisory scheme or with the removal limitations, it would be those structures and limitations that are unconstitutional, and would not implicate an ALJ's ability to issue orders or adjudicate cases.

First, Defendant claims, and Plaintiff does not dispute, that the Secretary has "formally delegated the supervisory function over ALJs to the Administrative Review Board." *See* Def. Opp. & Mot. at 10. The Administrative Review Board is an appellate body that has been delegated authority by the Secretary of Labor to review ALJs' decisions under an enumerated number of laws and regulations. *See Delegation of Authority and Assignment of Responsibility to the Administrative Review Board,* 77 Fed. Reg. 69,378 (Nov. 16, 2012). This is different from the "supervision" discussed in *Edmond*. The Court in *Edmond* was discussing the distinction between principal and inferior officers and found that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. The Administrative Review Board does not "direct and supervise" the work of DOL ALJs. Furthermore, the Court in *Edmond* did not hold that inferior officers must be supervised by a principal officer directly in order to constitutionally perform their designated duties. That an inferior officer's work is "directed and supervised" *at some level* by a principal officer is a test for determining whether someone is an inferior officer, not whether that inferior officer is properly appointed or can lawfully carry out his or her duties.

Regardless, even if the supervisory scheme were constitutionally deficient, a determination I am without authority to make, such a finding would imply that the manner of supervision would have to change, not that DOL ALJs are improperly appointed or cannot lawfully perform their duties.[10] I do not find that any potential issue with the manner of supervision of DOL ALJs should result in the dismissal or abeyance of this matter.

Defendant's motion based on the removal limitation argument is denied for similar reasons. Defendant concedes the "statutory flaw could be addressed only by a court ruling on the constitutionality of the offending provision . . . ." Def. Opp. & Mot. at 13, n.10. However, Defendant argues that dismissal would "provide a temporary remedy" since the ALJ would not be exercising the responsibilities of an officer of the United States. *Id.* I find that any such "temporary remedy" is unwarranted.

Like the issue of whether ratification renders an appointment valid, the Court in *Lucia* expressly declined to address whether the restrictions on removing the Commission's ALJs are constitutional. *Lucia*, 138 S. Ct. at 2050, n.1. The removal issue was addressed in the concurring opinion by Justice Breyer, but he made it clear that he only raised a potential issue that *may* be a problem. *See id.* at 2060-61 (Breyer, J. concurring and dissenting).

Moreover, the Court in *Free Enterprise Fund* held that the petitioners there were "not entitled to broad injunctive relief against the Board's continued operations," only "declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513; *see also id.* at 508 ("Nor is there any substance to the dissent's concern that the 'work of all these various officials' will 'be put on hold.' As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might someday be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office." (internal citation omitted)). This suggests that, contrary to Defendant's argument, any issue with the removal protections would not affect an ALJ's ability to lawfully perform his or her duties.

I find that any potential removal issue does not warrant dismissing this matter or holding it in abeyance and I deny the request based upon this argument. The ratification by the Secretary of Labor remedied the Appointments Clause issue, and any other potential constitutional issues identified by Defendant should not prevent this matter from proceeding.

Defendant's Motion to Reconsider Order Granting OFCCP's Motion to Reassign and Motion to Dismiss or to Hold in Abeyance are denied.

[10] *See also* Def. Opp. & Mot. at 10: "This problem can be remedied by action by the Secretary. The Secretary must retain power to hear administrative appeals or vest the authority with another principal officer, such as the Deputy Secretary, as was the Department's practice until 1996."

The parties are ordered to participate in a conference call on January 23, 2019, at 9:30 a.m. Pacific time to set hearing dates and lift the stay. The parties will be provided access code information for the call at a later time.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge